

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D13759
Y/hu

_____AD3d_____

Argued - January 9, 2007

HOWARD MILLER, J.P.
ROBERT A. SPOLZINO
JOSEPH COVELLO
RUTH C. BALKIN, JJ.

2006-02268

DECISION & ORDER

In the Matter of Austin E. Basner, deceased.
William Yale, et al., appellants; Charles Basner,
et al., respondents.

(File No. 662/02)

Ronald Francis, New York, N.Y., for appellants.

Bull, Morreale, Judelson & Diamond, P.C., Middletown, N.Y. (Charles A. Judelson
and Lorraine C. Diamond of counsel), for respondent Charles Basner.

Myra S. Shrier, Highland Park, N.J., respondent pro se.

In a proceeding to settle the account of William Yale and Albert L. Polon, as executors of the estate of Austin E. Basner, the petitioners appeal from so much of an order of the Surrogate's Court, Orange County (Slobod, S.), dated February 10, 2006, as denied their cross motion for summary judgment dismissing certain affirmative defenses and objections of Charles Basner and Myra Shrier.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

The Surrogate's Court properly denied the petitioners' cross motion for summary judgment dismissing certain affirmative defenses and objections of Charles Basner and Myra Shrier (hereinafter the objectants). In response to the petitioners' prima facie showing of entitlement to judgment as a matter of law that they retained a qualified attorney and a qualified accountant, the objectants raised triable issues of fact as to the adequacy of the attorney's performance and the

February 6, 2007

Page 1.

MATTER OF BASNER, DECEASED

accountant's performance. In response to the petitioners' showing that they properly requested a release from the beneficiaries before making payment to them from the residuary estate, the objectants raised an issue of fact as to whether the release was overbroad and inappropriate for only a partial distribution. In response to the petitioners' showing that they acted prudently in liquidating the decedent's IRA account that was losing value, the objectants raised an issue of fact as to whether the estate suffered a loss because of their imprudent handling of the IRA account with regard to taxes (*see* EPTL 11-2.3[b][3][B]). Since triable issues of fact exist, summary judgment was properly denied (*see Matter of Janes*, 90 NY2d 41, 50; *Matter of Skelly*, 284 AD2d 336).

Contrary to the objectants' contentions, however, sanctions are not warranted on this appeal under the circumstances of this case (*see* 22 NYCRR 130-1.1[c]).

MILLER, J.P., SPOLZINO, COVELLO and BALKIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court